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82-715

IN THE

SUPREME COURT OF THE UNITED STATES

October term, 1982

NO.....

ADRON P. BRAINERD,
Petitioner,

-vs-

WARREN E. BURGER, Chief Justice,
United States Supreme Court, and
H. S. CUNNINGHAM, Clerk of the
United States Districk Court,
Northern Division of Illinois,
Eastern Div.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Adron P. Brainerd, pro se
520 South Garfield Ave.
Libertyville, Illinois, 60048
(312) 362-7545

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QUESTIONS PRESENTED

A. Can H.S. Cunningham, Clerk of the United States District Court, Northerm District be granted judical immunity for improper docket entries and false certification of the record?

B. Can the United States District Court, Northern District of Illinois, Easterm Div., ORDER the clerk to enter a proper Rule 58 judgment in 72 C 1571 action under Rule 60(a)?

C. Can Warren E. Burger, Chief Justice, United States Supreme Court be granted judical immunity for improper supervision of the clerk's docket entries?

CITATIONS

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Cases

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WARREN E. BURGER, Chief Justice,
United States Supreme Court, and
H. S. CUNNINGHAM, Clerk of the
United States Districk Court,
Northern Division of Illinois,
Eastern Div.,
Respondents.

The petitioner Adron P. Brainerd, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceedings on March 11, 1982, with a rehearing denied on April 19, 1982. A continuance of sixty days was granted by the United States Supreme Court with the date of filing a Writ of Certiorari due on or before September 16, 1982.

OPINION BELOW

The opinion of the Court of Appeals appears at pages 1 through 3 and the opinion of the United States District Court, appears at pages 4 through 13 in the appendix which is attatched hereto behind the petition.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on march 11, 1982. This Court's jurisdiction is invoked under 28 U.S.C., section 1254(1).

QUESTIONS PRESENTED

A. Can H.S. Cunningham, Clerk of the United States District Court, Northerm District be granted judical immunity for improper docket entries and false certification of the record?

B. Can the United States District Court, Northern District of Illinois, Easterm Div., ORDER the clerk to enter a proper Rule 58 judgment in 72 C 1571 action under Rule 60(a)?

C. Can Warren E. Burger, Chief Justice, United States Supreme Court be granted judical immunity for improper supervision of the clerk's docket entries?

DEFENDANT'S STATEMENT OF FACTS

On June 27, 1972, plaintiff filed a pro se complaint in the United States District Court, Northern District of Illinois, (Brainerd v. Beal, et al., No. 72 C 1571) against two bank officers which alleged violations of several federal statuttes. After securing representation by an attorney, plaintiff filed an amended complaint. On January 30, 1973, the District Court granted the defendant bank officers' motion to dismiss the amended complaint and entered a minute order to that effect; The docket entry for that order appears as follows:

1-30-73 Order defendants' motion to dismiss plaintiff's amended complaint is granted. Order plaintiff's amended complaint is dismissed. (Court's Memorandum opinion will be filed within short date) - Will, J. (JS6) Mailed Notices 2-1-73

The docket did not indicate that a judgment was ever set forth on a separate document as required by Rule 58, Federal Rules of Appellate Procedure (Fed. R. Civ. P.)

Plaintiff attempted to take an appeal from the January 30, 1973 order by filing a notice of appeal on March 2, 1973. Brainerd v. Beal, 498 F.2d 901, 902 (7th Cir.), cert; denied, 419 United States 913 (1975). March 2, 1973, was thirty-one days after January 30, 1973. The Seventh Circuit dismissed the appeal because the notice was not filed within thirty days from January 30, 1973, as required by Rule 4(a), Federal Rules of Appellate Procedure.

The court rejected affidavits signed by a deputy clerk which contradicted the docket by stating that an order dated January 30th normally would have been entered on January 31st or February 1st; instead the court accepted the docket sheet as it appeared on its face.

The court rejected affidavits signed by a deputy clerk which contradicted the docket by stating that an order dated January 30th normally would have been entered on January 31st or February 1st; instead the court accepted the docket sheet as it appeared on its face.

Plaintiff alleges that after his appeal was dismissed he filed a state court action against his attorney, apparently for legal malpractice. Brainerd v. Kates, 25 Ill. Dec. 315, 386 N.E.2d 586. The state court allegedly granted the attorney defendant's motion for summary judgment following submission of an affidavit made by H. Stuart Cunningham, of the U.S. District Court Clerk. The affidavit stated that the January 30th order in Brainerd v. Beal was filed within thirty days of the date the order was entered on the docket.

On the basis of these facts plaintiff filed a three-count complaint against defendants' Burger and Cunningam. Count I abridged plaintiffs' constitutional right of access to the courts, thereby violating 42 U.S.C., section 1983 as well as rights secured by the First, Forth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

In Count II, plaintiff alleged that defendant Cunningham violated the Freedom of Information Act (FDIA), 5 U.S.C. section 552, by failing to respond to plaintiff's January 18, 1978 request to produce all papers related to the notice of appeal and the docketing procedure in Brainerd v. Beal.

In Count III, plaintiff alleged that defendant Burger breached his supervisory duties over the Federal Courts with regard to Rules 58 and 79(a) of the Federal Rules of Civil Procedure and wrongfully failed to grant certiorari and remand the case of Brainerd v. Beal.

Plaintiff sought damages from both defendants in the amount prayed from both defendants in the amount prayed for in Brainerd v. Beal as well as damages resulting from a posible action by plaintiff's former attorney, Richard Kates; Attorney fees, costs and other appropriate relief were also prayed for.

Defendants moved to dismiss Counts I an III for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. Defendant Cunningham moved for judgment on the pleadings with respect to Count II. The District Court dismissed Counts II and III on October 11, 1978.

On October 25, 1978, plaintiff filed a motion (at the Court's suggestion), "...TO CORRECT CLERICAL MISTAKES AND OMISSIONS IN BRAINERD VS. BEAL, 72 C 1571" which sought an order requiring the clerk to enter an order as required by Rule 58 and 79(a), Fed. R. Civ. P. from which an appeal could be taken.

A. REASONS FOR GRANTING THE WRIT

I.

Purpose and Application of Rule 58 & 79(a)

The sole purpose of the separate document requirement which was added to Rule 58 in 1963, was to clarify when time for an appeal under 28 U.S.C. Sec. 2107 begins to run, Bankers Trust Co. v. Mallis 435 U.S. 381, 385 (1978).
The provision is, as professor Moore states, a "mechanical change" that must be mechanically applied in order to avoid new uncertainties as to the date on which a judgment is entered U.S. v. Indrelunas 411 U.S. 219, 222. (1973), Coperton v. Beatrice Pocahontas Coal Co. 585 F. 2d 683, 688 (4th Cir. 1978).

II.
Duty of the Court Clerk

Each clerk of court and his deputies are required to swear upon oath to truly and faithfully enter and record all orders, decrees, judgments, adn proceedings of the U.S. District Court, and Rule 79(a) provides that the clerk shall keep a book known as the civil docket and all judgments shall be entered chronologically in the civil docket, and the entry of an order or judgment shall show the date the entry is made.

18 U.S.C.A. 2073, 2076 provides for a penalty for failure to make an entry, or a false or fictitious entry within his records, if done with intent to decieve, mislead, injure, or defraud.

III.

The Clerk's Breach of Statutory Duty.

On 2-1-73 it became the statutory duty of the court clerk and his deputies to enter the judgment of Judge Will in Brainerd v. Beal 72 C 1571 on the docket sheet and show the date the entry is made. Not only did the clerk fail to show the date of docket entry but then falsely certified that certified that the date 1-30-73 in the left hand margin was the date of entry on the docket sheet, to this court, and this court relying on this certification dismissed the appeal of Brainerd v. Beal supra, at 901.

Thus the harm was done when the false entry of 1-30-73 was made, and the error was compounded by the false certification that the entry was correct.

The Court held in Tcherepnin v. Franz, 570 F. 2d 187 (7th Cir. 1978) at 194, held
...failure of a public official to perform acts required by statute constitutes an actionable breach of a ministerial duty (citations).
In Madox v. Astro Investments 45 Ohio App. 2d 203, 343 N.E. 2d 133, 137 the court concluded that failure of the clerk of court to docket and index certificate of judgment for several days, constituted negligence as a matter of law, and the clerk is liable in a civil action for a negligent omission to perform a statutory duty which proximately causes injury to another, 14 C.J.S. Clerks of Courts; 1250, 1252, 1261; 15 American Jurisprudence 2d 532, Clerks of Court, Section 27; Raitport v. Provident Nat. Bank 451 F. Supp. 522 (1978).

IV.

Absolute Immunity does not Apply

Prior to May 19, 1972, the Clerk of U.S. District Courts were required to provide a bond under statute 28 U.S.C. Section 952 conditioned on the faithful performance of the duties of his office. This Court concluded in Howard v. U.S (1902) 184 U.S. 676, 687, that an individual suitor had course of action on a clerk's bond, and that federal courts had jurisdiction; and that this is what Congress had in mind when they enacted the Statute.
The Court concluded:

> "In our opinion, the bond of the clerk is for the benefit of every suitor injured by the failure of that officer faithfully to discharge his duties or seasonably to record the decrees, judgments, and determinations of the Court" (page 687).

In 1972 Congress enacted H.R. 13150 (P.L. 92-310) U.S. Congress page 2364, abolishing the surety bond requirement as a cost saving measure, and the Federal Government assumes by self-insurance the risk of fidelity loss. It provides that the amount of any loss due to the fault or negligence of a Federal employee shall be charged to the agency's appropriation or other available appropriate fund. The record at page 2365 states:

> "The rationale behind the abolition of the procedure of acquiring surety bonds for Federal employees is that self-insurance is a finacially sound procedure if the self-insurer is able to assume the risk...

> In addition to the ability of the Federal Government to take the risk of loss through the fault or negligence of an employee, statistics show that the cost of the bonding program is greater than the amount of claims filed".

In Williams v. Wood (612 F. 2d 852 5th Cir. 1980), a litigant brought an action against deputy clerk of the Federal District Court, alleging that the clerk had failed to notify the litignat of entry of final judgment and thereby prevented him from appealing. The United States District Court Dismissed the suit on the basis of "absolute immunity", and the Court of Appeals reversed holding:

> "routine duty of cort clerks does not fall within the narrow exception for clerical action explicitly commanded by a cort decree or by judge's insturction. Dismissal of an action is proper only when he is qualified immune." (page 985).

In Henriksen v. Bentley (644 F. 2d 852, 855 10th Cir. 1981) the court traced the history of "absolute immunity" citing Butz, Stump, Imber, Dennis, Smith, Denman, Williams, (cited above) Slotnick, Pierson, Wood, Scheuer, and concluded that a clerk of court has immunity only where he can show that he was acting in pursuant to his lawful authority and following in good faith the instructions of the court and was not in degrogation of those instructions or rules.

Like many states, Illinois accords its executive officials a qualified immunity from suit. Prosser, The Law of Torts 132 at 939 (4th ed. 1971). Illinois law holds that a state official is liable in damages to those he injures if he negligentlhy breaches a ministerial duty or if he wilfully and maliciously breaches a discretionay duty, e.g. Hering v. Hilton, 12 Ill. 2d 559, 562, 147 N.E. 2d 311 (1958); Myers v. Krajefska, 8 Ill. 2d 322, 329, 134 N.E. 2d 277 (1956); People ex rel. Munson v. Bartels, 138 Ill. 322, 328, 27 N.E. 1091, 1092 (1891); Gilbert v. Bone, 64 Ill. 518, 524 (1872); Paoli v. Mason, 325 Ill. App. 197, 209, 59 N.E. 2d 499, 504 (1945). The Illinois Appellate Court reaffirmed and applied these settled principles lately in Hoffman v. Ajack, 57 Ill. App. 3d 744, 373 N.E. 2d 486 (1978).

The Illinois Supreme Court in Munson, supra, defined the ministerial duties of a Court Clerk as follows:

> "Official duty is ministerial when it is absolute, certain, and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode, and occasion of its performance with such certainty that nothing remains for judgment or discretion."

B. Rule 58 Judgment Should Be Allowed Under Rule 60(a)

The sole purpose of the separate document requirement which was added to Rule 58 in 1963, was to clarify when time for an appeal under 28 U.S.C. Sec. 2107 begins to run, Bankers Trust Co. v. Mallis 435 U.S. 381, 385 (1978).
The provision is, as professor Moore states, a "mechanical change" that must be mechanically applied in order to avoid new uncertainties as to the date on which a judgment is entered U.S. v. Indrelunas 411 U.S. 219, 222. (1973), Coperton v. Beatrice Pocahontas Coal Co. 585 F. 2d 683, 688 (4th Cir. 1978).

Until such entry is made the time for appeal will not normally run. In Coperton the Court at page 688 concluded:

> "Precise identification of the date on which the judgment was entered is necessary whenever the timeliness of an appeal to this court is in issue... absent entry a party will not ordinarily be found to have exceeded, regardless of when the notice of appeal was filed... nor can we penalize plaintiffs for their procedrual nonchalance by binding them to their erronous assertion that judgments of dismissal had been entered".

The court in Calhoun v. United States(647 F.2d 6,9 9th Cir. 1981) followed the reasoning of Caperton.

C. Absolute Immunity does not Apply to Chief Justice Burger

Chief Justice's Statutory Duties

Pursuant to 28 U.S.C.A. Section 332 Chief Justice Burger is directed to summon annually the Chief Judge of each judicial circuit, to a conference known as the Judicial Conference of the United States for the purpose of submitting suggestions to the various courts in the interest of uniformity and expedition of business. The conference also carries on a continuous study of the operation and effect of the general rules of practice and procedure in use. (Federal Practice and Procedure 32 Am. Jus. 2d Sec. 4).

Also aside from his duty as supervisor or council, Chief Justice Burger had judicial duties enforcing Rule 58 and 79(a), (Count III paragraph 13 of the Complaint).

The broad doctrine of judical immunity does not apply to acts which are not judical, but are purely ministerial, and is responsible for error or misconduct, 48A C.J.S. JUDGES, paragraph 90, page 699.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgments and opinions of the Courts below.

Respectfully sbmitted,

Adron P. Brainerd, pro se
520 South Garfield Ave.
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Respondents.

APPENDIX

Adron P. Brainerd, pro se
520 South Garfield Ave.
Libertyville, Illinois, 60048
(312) 362-7545

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

April 19, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. JESSE E. ESCHBACH, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

ADRON P. BRAINERD,

Plaintiff-Appellant,

No. 79-1898 vs.

WARREN E. BURGER, Chief Justice, United States Supreme Court, and H.S. Cunningham, Clerk of the U.S. District Court, Northern District of Illinois, Eastern Division.

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 78-C-1452

Prentice H. Marshall, Judge.

ORDER

On March 25, 1982, plaintiff-appellant Adron P. Brainerd filed a petition for rehearing with suggestion for rehearing en banc. All of the judges of the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the petition. The petition is therefore DENIED.

APP I

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

Submitted: February 25, 1982*

March 11, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. JESSE E. ESCHBACH, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

ADRON P. BRAINERD,
Plaintiff-Appellant,

No. 79-1898 vs.

WARREN E. BURGER, Chief Justice of the U.S. Supreme Court, and H. S. CUNNINGHAM, Clerk of the U.S. District Court, Northern District of Illinois, Eastern Division.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 78-C-1452
Hon. Prentice H. Marshall, Judge.

ORDER

The pro se plaintiff-appellant, Adron P. Brainerd, appeals from the dismissal of his civil rights claims against defendants-appellants, Warren E. Burger, Chief Justice of the United States, and H. Stuart Cunningham, Clerk of the United States District Court for the Northern District of Illinois, the dismissal of his action under the Freedom of Information Act (FOIA) against Cunningham, and the denial of his motion under Fed. R. Civ. P. 60(a) to correct a clerical mistake in

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*/ After preliminary examination of the briefs, the court notified the parties that it had tentatively decided that oral argument was unnecessary. The notice provided that any party could file a "Statement as to Need of Oral Argument." See Fed. R. App. P. 34(a); Circuit Rule 14(f). Neither party filed such a statement. Upon consideration of the briefs and the record, the appeal is submitted for decision without oral argument.

APP II

ORDER

The pro se plaintiff-appellant, Adron P. Brainerd, appeals from the dismissal of his civil rights claims against defendants-appellants, Warren E. Burger, Chief Justice of the United States, and H. Stuart Cunningham, Clerk of the United States District Court for the Northern District of Illinois, the dismissal of his action under the Freedom of Information Act (FOIA) against Cunningham, and the denial of his motion under Fed. R. Civ. P. 60(a) to correct a clerical mistake in

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*/ After preliminary examination of the briefs, the court notified the parties that it had tentatively decided that oral argument was unnecessary. The notice provided that any party could file a "Statement as to Need of Oral Argument." See Fed. R. App. P. 34(a); Circuit Rule 14(f). Neither party filed such a statement. Upon consideration of the briefs and the record, the appeal is submitted for decision without oral argument.

the entry of judgment in Brainerd v. Beal, No. 72-C-1571 (N.D. Ill. January 30, 1973), aff'd, 498 F.2d 901 (7th Cir.) (per curiam), cert. denied, 419 U.S. 1069 (1974), rehearing denied, 420 U.S. 913 (1975). Initially, the district court orally dismissed the civil rights claim against Chief Justice Burger and the FOIA claim against Cunningham. Subsequently, in an unpublished Memorandum Decision, the court dismissed the civil rights claim against Cunningham and denied Brainerd's motion under Fed. R. Civ. P. 60(a).

The statement of facts in the district court's Memorandum Decision is adequate for our purposes. However, we also note that Brainerd unsuccessfully sued his attorney for malpractice in state court. Apparently, based upon the affidavit of Cunningham, that court determined, contrary to this court's finding, that the judgment in Brainerd v. Beal was entered on February 1, 1973 and, therefore, that Brainerd's attorney was not negligent with respect to the filing of the notice of appeal.

We agree with the reasons for dismissing the civil rights claim against Cunningham set forth in the district court's Memorandum Decision, and they need not be repeated here. With respect to the civil rights claim against Chief Justice Burger, it is clear that, to the extent that the Chief Justice had any supervisory authority over Cunningham's entry of judgment in Brainerd v. Beal, he is absolutely immune from any liability arising out of its alleged nonfeasance, misfeasance or malfeasance.

Stump v. Sparkman, 435 U.S. 349 (1978); Skolnick v. Campbell, 454 F.2d 531 (7th Cir. 1971); Brown v. Dunne, 409 F.2d 341 (7th Cir. 1969). It is also clear that FOIA does not apply to the courts of the United States. See 5 U.S.C Sect. 551(1)(B). Thus, the dismissal of the FOIA claim also was proper.

The denial of Brainerd's motion under Fed. R. Civ. P. 60(a), which was made at the district court's suggestion, also was proper. The disposition of this motion depends upon the application of the "Law of the Case" doctrine, See 1A Moore's Federal Practice Sect. 0.404[1], which militates against relitigation of issues decided in a previous stage of an action, but does not apply to questions which might have been decided in a previous stage but were not. 1A Moore's Federal Practice Sect. 0.404[10]. Moreover, even where an issue was previously decided, the "Law of the Case" doctrine does not absolutely bar subsequent reconsideration of it. The doctrine is not rigidly applied where the court determines that the declared law of the case is erroneous. 1A Moore's Federal Practice Sect. 0.404[1]. Reconsideration of jurisdictional issues is more appropriate than reconsideration of procedural and other non-jurisdictional issues. 1A Moore's Federal Practice Sect. 0.404[4]. However, although it does not have the same effect as the doctrine of res judicata, the "Law of the Case" doctrine

is more impelling than stare decisis because the "efficient dispatch of court business in a manner fairly approximating 'justice' is sometimes better than a tardy disposition that may approximate more nearly some theoretical ideal." 1A Moore's Federal Practice Sect. 0.404[1], at 4208 (footnote omitted).

In dismissing Brainerd's appeal in Brainerd v. Beal as untimely, we determined that the date of entry of judgment shown on the docket sheet could not be impeached by affidavit. Calculating the timeliness of the notice of appeal from the date, we held that the notice was not timely filed. Brainerd v. Beal, 498 F.2d at 902-03. The issue raised by Brainerd's Rule 60(a) motion is somewhat different. He now contends that the district court never entered final judgment on a separate document as required by Fed. R. Civ. P. 58. Because this issue was not actually resolved by our disposition of Brainerd's previous appeal, litigation of it is not precluded by the "Law of the Case" or a related doctrine. Brainerd requests in his motion that a judgment complying with Rule 58 now be entered, contenting that a timely appeal could be taken from such an entry. However, by his actions in the previous appeal, Brainerd has waived his objection to the failure to comply with Rule 58.

In Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978) (per curiam), the Court determined that the parties may waive the "separate document" requirement. It held that they had done so where: (1) the district court evidenced its intent to make a final, appealable decision; (2) a judgment of dismissal was recorded on the docket sheet; and (3) the appellee did not object to the appeal on

the ground that there was not a separate judgment. 435 U.S. at 387. See Also Escamilla v. Santos, 591 F.2d 1086 (5th Cir. 1979) (per curiam). The circumstances of this case compel the conclusion that the parties waived the "separate document" requirement. In Brainerd v. Real, as in Bankers Trust, the district court evidenced its intent to dismiss Brainerd's complaint entirely, thereby rendering a final, appealable decision; a dismissal was entered on the docket sheet; and the parties both proceeded as if a valid, appealable judgment had been entered. Moreover, at this point, approximately nine years after the judgment entry complained of, it would be unjust to provide the requested relief, even if Brainerd may have had a valid argument for dismissing the appeal without prejudice at the time. See United States v. Indrelunas, 411 U.S. 216 (1973) (per curiam).

AFFIRMED.

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

NO. 78 C 1452

ADRON P. BRAINERD,

Plaintiff,

-vs-

WARREN E. BURGER, Chief Justice,
United States Supreme Court, and
H. S. CUNNINGHAM, Clerk of the
United States Districk Court,
Northern Division of Illinois,
Eastern Div.,

Defendants.

MEMORANDUM DECISION

On June 27, 1972, plaintiff filed a six count pro se complaint against two bank officers for violations of several federal statutes, claiming they had vailed to honor an oral agreement to stop payment on a cashier's check which plaintiff had presented to Joe Cross for purchase of an airplane. The case number of that action was 72 C 1571 and it was assigned to Judge Will. On October 24, 1972, Judge Will dismissed all but Count III of the complaint and gave Brainerd leave to file an amended Count III of the complaint and which would plead the alleged fraud with the requisite specificity.

After securing representation by attorney Richard Kates, Brainerd filed an amended complaint which sought to remedy that defect. He failed. On January 30, 1973, Judge Will granted defendants' motion to dismiss the amended complaint and entered a minute order dismissing the amended complaint. The docket entry for that order read as follows:

Date	Proceedings
1-30-73	Order defendants' motion to dismiss plaintiff's amended complaint is granted. Order plaintiff's amended complaint is dismissed. (Court's Memorandum opinion will be filed within short date) - Will, J. (JS6) Mailed Notices 2-1-73

Judge Will filed his memorandum opinion in support of that order on February 12. He held that the amended complaint failed to state a claim upon which relief could be granted and that it was barred by the Illinois statute of limitations. The opinion explained that although Brainerd's grievances could support actions in state court, he had no basis for relief in the federal courts.

Brainerd attempted to perfect an appeal from the January 30 order, by filing a notice of appeal on March 2, 1973. However, the Seventh Circuit dismissed the appeal, because the notice was not filed within thirty days from January 30, as required by Rule 4(a) of the Federal Rules of Appellate Procedure. The court rejected "unsworn affidavits signed by a deputy clerk of the district court," which contradicted the docket by stating that an order dated January 30 would normally have been entered on January 31 or February 1. Brainerd V. Beal, (7th Cir. 1974).

Instead, the court accepted the docket sheet as it appeared on its face, and found that it listed the entry of the district court's judgment on January 30, 1973 . Brainerd, supra at 901. The Supreme Court denied certiorari, 419 U.S. 1069 (1974) and denied rehearing, 420 U.S. 913 (1975).

On April 17, 1978, Brainerd filed a pro se complaint against Chief Justice Warren Burger and Stuart Cunningham, Clerk of the Court for this district. The complaint contains factual allegations which support Brainerd's earlier contention that Judge Will's judgement was actually entered on February 1, 1973, thereby suggesting that his appeal should not have been dismissed as untimely.

Brainerd alleges after his appeal was dismissed, he filed a state court action against his attorney Richard Kates, apparently for legal malpractice. Kates moved for summary judgment. He attached an affidavit from Stuart Cunningham, Clerk of this Court, who explained the docketing procedures of his office at the time the January 30, 1973 order was entered. Cunningham stated that the "I-30-73" date in the left margin of the docket sheet represented the date on which Judge Will entered his order. He further stated that the date given for the mailing of the notices, i.e. "2-1-73," was the date on which the order was actually entered on the docket sheet by his employees. Cunningham concluded that Brainerd's notice of appeal was filed within thirty days of the date the order was entered.

On the basis of this affidavit, the state court granted Kate's motion for summary judgement, finding that the appeal was timely and that Kates was not negligent in prosecuting it.

On the basis of the revelation, Brainerd has framed three counts against defendants Burger and Cunningham. In Count I, Brainerd claims that Cunningham has violated his constitutional right of access to the courts by making an improper docket entry, thereby transgressing 42 U.S.C. Sect. 1983. In Count II, plaintiff claims that Cunningham has violated the Freedom of Information Act by refusing to respond to his January 18, 1978 request for all papers relating to his notice of appeal and to the clerk's pertinent docketing procedures. In Count III, Brainerd claims that defendant Burger has violated his duty to supervise and enforce proper procedures in the application of Rules 58 and 79(a) of the Federal Rules of Civil Procedure, by failing to grant certiorari and remand the action in Brainerd v. Beal, supra. For relief, Brainerd seeks damages against both defendants for the amount sought in paragraph 11 of his complaint in 72 C 1571, as well as attorney's fees, costs, and other appropriate relief.

Defendants moved to dismiss Counts I and III of the complaint and moved for judgement on the pleadings on Count II. On October 11, 1978, we rendered an oral decision dismissing Counts II and III.

. We also suggested that Judge Will's January 30 order might not have been a final and appealable judgement, since the docket did not indicate that a judgement was ever set forth on a separate document, as required by Rule 58, F.R.Civ.P. Acting upon this suggestion, Brainerd moved to correct the record in 72 C 1571 and to direct the clerk to enter a Rule 58 judgement in that action. Conceivably, Brainerd could then appeal from that judgement and finally argue the merits of his case.

Before we consider that relief, we must decide whether Count I of Brainerd's complaint has a jurisdictional basis and states a claim for damages against the clerk. Brainerd alleges that Count I is based upon 42 U.S.C. Sect. 1983 and its jurisdictional counterpart, 28 U.S.C. Sect. 1343, because defendant Cunningham has acted under color of Rules 58 and 79(a), F.R.Civ.P., to deprive him of his constitutional rights under the First, Fourth, Sixth and Fourteenth Amendments to the federal constitution. In addition, he has moved to amend his complaint to add the First, Fourth, Sixth and Fourteenth Amendments to the federal constitution. In addition, he has moved to amend his complaint to add the Fifth Amendment as a jurisdictional basis.

Section 1983 provides a cause of action for constitutional deprivations arising out of actions taken under color of state law. However, it does not support a claim for actions taken under color of federal law. Askew v. Bloemker. 548 F.2d 673, 677 (7th Cir. 1976).

Because the clerk's alleged actions were authorized by the federal rules of civil procedure, rather than by state law, plaintiff's complaint lacks an essential jurisdictional predicate for a claim under Sect. 1983. Robinson v. Bergstrom, 579 F.2d 401, 404 (7th Cir. 1978). We also find that plaintiff's claims do not involve the deprivation of any rights protected by the First, Fourth, Sixth, or Fourteenth Amendments. Therefore, plaintiff cannot bring an action under 28 U.S.C. Sect. 1331 based directly on those amendments. see Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). Nevertheless, Brainerd may well have a jurisdictional foothold under the due process clause of the Fifth Amendment, since three circuits have found a Bivens cause of action to be stated under that amendment. See. e.g., Loe v. Armistead, 582 F.2d 1299 (4th Cir. 1978) and cases collected in Davis v. Passman, 571 F.2d 793, 807-08 n.6 (Goldberg, J., dissenting).1/

1/ The Seventh Circuit has not directly faced the question of extending the Bivens rationale to claims under the Fifth Amendment. It has advised that "such a rationale should be made discreetly, but when appropriate, courts should do so." Green vs. Carlson, 581 F.2d 669, 673 (7th Cir. 1978). Among district courts in this circuit, Judge Grady recently implied a Bivens cause of action against federal officers under the equal protection component of the Fifth Amendment as a remedy for age discrimination in federal employment. Christie v. Marston, 451 F. Supp. 1142, 1144 (N.D. Ill. 1978).

Even assuming jurisdiction on that basis, however, Brainerd faces another insuperable obstacle to any claims for damages. The Seventh Circuit has granted absolute judicial immunity to court cle rks when they are discharging their official responsibilities. Dieu v. Norton, 411 F.2d 761, 763 (7th Cir. 1969); Brown v. Dunne. 409 F.2d 341, 343 (7th Cir. 1969). Other federal courts have taken a different view and have only given a qualified immunity to court clerks when they act in neglect or violation of their ministerial duties, such as filing papers and preparing records. See cases collected in Marty's Adult World of New Britain, Inc. v. Guida, 453 F. Supp. 810, 816 (D. Conn. 1978). Those courts have reasoned that absolute immunity is only necessary to protect an official's discretion in making crucial decisions, and that a clerk exercises no discretion when he performs required ministerial duties. See McCray v. State of Maryland. 456 F.2d 1, 4-5 (4th Cir. 1972). The Seventh Circuit considered this argument in Brown, supra, and seemed to agree that ministerial functions are not covered by official immunity. However, the court applied a narrow definition of ministerial functions, and specifically held that the charges against the clerk, which involved "malfeasance with respect to filing documents," "comprehend judicial rather ministerial functions." 409 F2d at 342-43. We are bound to follow the logical import of this rule, and believe that the charges against Cunningham are sufficiently akin to those in Brown so as to fall within the ambit of absolute immunity. For this reason, Count I of plaintiff's complaint must be dismissed.

We are left with plaintiff's motion to correct the record in 72 C 1571 and to direct the clerk to enter a proper Rule 58 judgment in that action. The defect identified in this motion qualifies as a clerical mistake within the scope of Rule 60(a), which provides that:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

See Hamilton v. Stillwell Van & Storage Co., 343 F.2d 453, 455 (3d Cir. 1965); Pattiz v. Schwartz, 386 F.2d 300, 303 (8th Cir. 1968). Because Rule 60(a) is an express recognition of the inherent power of the federal courts, to correct clerical errors in judgements, American Trucking Association v. kFrisco Transportation Co., 358 U.S. 133, 145 (1958), we have power to consider Brainerd's Rule 60(a) motion in the 72 C 1571 despite the dismissal of his complaint in the present action.

The basic defect in plaintiff's motion is that he is attempting to relitigate [2] an issue which was conclusively determined against him by the Seventh Circuit in his original appeal. The court dismissed Brainerd's appeal as untimely under Rule 4(a), F.R.App.P. To apply that Rule, it was necessary for the court to identify the date upon which the judgment was "entered," since the rule provides that "the notice of appeal...shall be filed...within 30 days of the date of the entry of the judgment or order appealed from." The process of determining when a judgment is entered is explained in Coperton v. Beatrice Pocahontas oal Co., 585 F.2d 683, 688 (4th Cir. 1978):

> "Precise identification of the date on which an order or judgment was entered is necessary whenever the timeliness of an appeal to this court is in issue, since the time for filing a notice of appeal under Rule 4(a) begins to run only upon 'entry' of a judgment order and, absent such an entry, a part will not ordinarily be found to have exceeded any of the time periods set forth in the Rule regardless of when the notice of appeal was filed. 'Entry' has a well defined meaning under the rules; it occurs only when the essentials of a judgment or order are set forth in a written document separate from the court's opinion or memorandum and when the substance of this separate document is reflected in an appropriate notation on the docket sheet assigned to the action in the district court.

2/ Concededly at our suggestion on October 11, 1978.

> This dual requirement is established by Civil Rule 58, Entry of Judgment, which states that '[e]very j udgment shall be set forth on a separat e document' and that' [a] judgment is ef fective only when so set forth and when entered as provided in Rkule 79(a) [.' Rule 4(a), which is derived without change in substance from a former civil rule, incorporates both of these standards."

Thus, in the normal case, Rule 4(a) cannot even be applied to compute the 30-day period until it is first established that the judgment has been entered on a separate document and that judgment has been notated on the docket sheets. However, in the present case, the Court of Appeals applied the rule despite the absence of a separate document,[3/] and found that Judge Will's judgment was entered on January 30, 1973. That finding is conclusive as to Brainerd, and hes collaterally estopped from attacking it. Therefore, even if we were to correct the record to comply with the separate document requirement, Brainerd's time for appeal would still have to be computed from January 30, 1973. Our action would serve no useful purpose, since the thirty days in which kBrainerd must file his notice of appeal have long since lapsed.

3/ The Court of Appeals had jurisdiction to apply Rule 4(a) in this manner and reach a timeliness decision even absent a separate document. Bankers Trust Co. v. Mallis, 435 U.S. 381, 385 (1978).

For these reasons, Brainerd's Rule 60(a) motion is denied.[4/]

Judgment will enter dismissing plaintiff's action.

ENTER:

_____

Prentice H. Marshall
United States District Judge

Dated+ May 29, 1979

4/ We are distressed over the mousetrap in which Mr. Brainerd has been ensnared. The Court of Appeals for this Circuit held that Brainerd's lawyer let the time for appeal expire. The state court in essence held that Brainerd's lawyer did not let the time for appeal expire. We are bound by the Court of Appeals decision and have no authority to question the state court decision. We have pondered in vain for some remedy for Mr. Brainerd and can think of none.

Supreme Court, U.S.
FILED
JAN 18 1983
ALEXANDER L. STEVAS
CLERK

No. 82-715

In the Supreme Court of the United States

OCTOBER TERM, 1982

ADRON P. BRAINERD, PETITIONER

v.

WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner waived the separate-judgment requirement of Federal Rule of Civil Procedure 58 when the district court clearly intended to enter a final order, the order was entered on the docket sheet, and petitioner at no point objected to the absence of a separate judgment.

2. Whether Chief Justice Burger is immune from suit for damages arising from the Court's denial of a petition for a writ of certiorari.

3. Whether the district court clerk is liable to petitioner for failing to enter a final judgment as a separate document as required by Rule 58.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. P.1-P.5) is not reported. The opinion of the district court (Pet. App. P.6-P.16) also is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1982, and a petition for rehearing was denied on April 19, 1982 (Pet. App. I). On July 20, 1982, Justice Stevens extended the time in which to file a petition for a writ of certiorari to and including September 16, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Ten years ago, petitioner filed suit in the United States District Court for the Northern District of Illinois against two bank officers, alleging that they had violated 18 U.S.C. 1005 and 12 U.S.C. 503 by issuing a cashier's check without authorization and making false entries in bank records. *Brainerd* v. *Beal*, No. 72C157. The district court dismissed the complaint on January 30, 1973 for failure to state a claim upon which relief could be granted and, alternatively, because the claim was barred by the relevant Illinois statute of limitations. Petitioner appealed the district court's judgment on March 2, 1973.

The court of appeals dismissed petitioner's appeal as untimely. *Brainerd* v. *Beal*, 498 F.2d 901 (7th Cir. 1974). The court of appeals found that the district court's judgment was rendered on January 30, 1973 and that the docket sheet listed entry of judgment on that same day. The notice of appeal, which stated that it was "'from the order dismissing the amended complaint entered in this action on the 30th day of January 1973'" (498 F.2d at 902), was not filed until March 2, 1973, clearly outside the 30-day period provided by Rule 4(a), Fed. R. App. P. While petitioner submitted unsworn statements signed by a deputy clerk of the district court, noting that under "normal business practices" a judgment rendered on January 30 would have been entered on the docket January 31 or February 1, the court of appeals refused to permit the statements to impeach the docket. Accordingly, the court of appeals dismissed the appeal for lack of jurisdiction. This Court subsequently denied certiorari (419 U.S. 1069 (1974)) and denied rehearing (420 U.S. 913 (1975)).

2. Petitioner then brought suit against his attorney in Illinois state court, alleging, *inter alia*, that the attorney had negligently failed to file a timely notice of

appeal. The attorney moved for summary judgment, relying upon the affidavit of respondent Cunningham, Clerk of the United States District Court for the Northern District of Illinois. Cunningham's affidavit stated that, under the docketing procedures then in effect in the clerk's office, the district court's January 30, 1973 judgment in *Beal* would not have been entered on the clerk's docket until February 1, 1973, and that petitioner's notice of appeal therefore was timely filed within the prescribed 30-day period. On the basis of this affidavit, the state trial court granted the attorney's motion for summary judgment, finding that the attorney had not acted negligently. The Illinois appellate court affirmed, stating that, in the absence of expert testimony to the contrary, the attorney should be found to have exercised reasonable care in relying on the clerk's customary practice. *Brainerd* v. *Kates*, 68 Ill. App. 3d 781, 786, 386 N.E.2d 586 (1979).

3. On April 17, 1978, petitioner brought the present lawsuit, seeking damages from Cunningham under 42 U.S.C. (Supp. IV) 1983 and the First, Fourth, Sixth and Fourteenth Amendments for alleged deprivation of his constitutional right of access to the courts. Petitioner also asserted that Cunningham violated the Freedom of Information Act, 5 U.S.C. 552, by not responding to a January 18, 1978 request for all papers relating to the notice of appeal and the clerk's docketing procedures. In a separate count, petitioner claimed that Chief Justice Burger, by failing to grant certiorari and remand the *Beal* case, violated his statutory duty to supervise the lower courts and was himself liable for damages stemming from the allegedly improper docket entry.

On October 11, 1978, the district court dismissed petitioner's claim against Chief Justice Burger on the ground that the Chief Justice was immune from suit. The district court also dismissed petitioner's Freedom of Information Act claim against Cunningham (Pet.

App. P.9). On May 29, 1979, the court dismissed petitioner's remaining claims against Cunningham. The district court dismissed petitioner's Section 1983 claim because Cunningham had been acting under color of federal, and not state, law at the time he entered the district court's order of dismissal in *Beal* and certified the record on appeal (*id.* at P.10-P.11). The district court dismissed petitioner's constitutional tort claim on the ground that, under Seventh Circuit precedent, court clerks are absolutely immune from suit when discharging their official responsibilities (*id.* at P.12). Finally, the court denied petitioner's motion under Rule 60(a), Fed. R. Civ. P., to correct the record and require the entry of judgment in *Beal* on a separate document. The court reasoned that the court of appeals in *Beal* had conclusively found petitioner's appeal untimely and, therefore, principles of collateral estoppel would prevent petitioner from relitigating that issue even if the district court's judgment in *Beal* were now correctly entered (*id.* at P.15).

4. The court of appeals affirmed in an unpublished order (Pet. App. P.1-P.5). The court of appeals agreed with the district court's reasons for dismissing petitioner's claims against Cunningham (*id.* at P.2). The court of appeals also agreed with the district court that Chief Justice Burger was immune from suit and that petitioner's Freedom of Information Act suit against Cunningham should be dismissed because the FOIA does not apply to the courts of the United States (*id.* at P.2-P.3). Finally, the court of appeals affirmed the district court's denial of petitioner's Rule 60(a) motion. Finding that disposition of the motion depended upon application of the doctrine of law of the case, the court of appeals reasoned that reconsideration of the question of the timeliness of petitioner's appeal in *Beal* was not

necessarily precluded. Nevertheless, the court of appeals declined to consider petitioner's arguments under Rule 60(a), Fed. R. Civ. P., holding instead that petitioner had waived the "separate document" requirement of Rule 58, Fed. R. Civ. P. (Pet. App. P.5) because

> the district court evidenced its intent to dismiss [petitioner's] complaint entirely, thereby rendering a final, appealable decision; a dismissal was entered on the docket sheet; and the parties both proceeded as if a valid, appealable judgment had been entered.

The court of appeals further noted that it would be unjust to grant petitioner's motion, since over nine years had passed since entry of the district court's judgment in *Beal*. *Ibid.*

ARGUMENT

1. This case presents no issue worthy of further review. Petitioner's principal argument is that his appeal in *Beal* was untimely because the judgment of the district court was not entered on a separate document as required by Rule 58, Fed. R. Civ. P. However, even if petitioner's argument were well taken, the court of appeals correctly held that petitioner waived his rights under Rule 58, since the district court clearly intended to enter a final order, the district court's order was entered on the docket sheet, and petitioner at no point objected to the absence of a separate judgment. "Under these circumstances, [petitioner] should be deemed to have waived the separate-judgment requirement of Rule 58 * * *." *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381, 388 (1978).

2. The court of appeals also was correct in affirming the dismissal of petitioner's claim against Chief Justice Burger. When acting within their jurisdiction, judges are absolutely immune from suit. See *Dennis* v.

Sparks, 449 U.S. 24, 27 (1980); *Stump* v. *Sparkman*, 435 U.S. 349, 355-56 (1978); *Pierson* v. *Ray*, 386 U.S. 547, 553-55 (1967). Since petitioner's claim against the Chief Justice arises from the Court's denial of certiorari in *Beal* and refusal to remand the case, it is based upon judicial acts for which Chief Justice Burger is immune. See *Panko* v. *Rodak*, 606 F.2d 168, 171 (7th Cir. 1979), cert. denied, 444 U.S. 1081 (1980).

3. Petitioner's claim against respondent Cunningham similarly is without merit. As both courts below held, petitioner's claim based upon 42 U.S.C. (Supp. IV) 1983 was improper because Cunningham acted pursuant to the Federal Rules of Civil Procedure, and not under color of state law, in entering the order dismissing *Beal*. Moreover, petitioner's allegations do not show any violation of the First, Fourth, Sixth or Fourteenth Amendments.[1] Finally, Cunningham's alleged failure properly to enter judgment in *Beal* occurred on January 31 or February 1, 1973 (Pet. 7); the present action was not instituted until April 17, 1978 (Pet. App. P.8). Consequently, this action was brought after the expiration of the five-year limitations period provided by Illinois law for constitutional tort actions. See *Beard* v. *Robinson*, 563 F.2d 331, 338 (7th Cir. 1977).[2]

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[1] Even if a plausible constitutional tort claim were alleged, under relevant Seventh Circuit precedent Cunningham was immune from suit for acts taken within the scope of his official responsibilities. See *Dieu* v. *Norton*, 411 F.2d 761, 763 (7th Cir. 1969); *Brown* v. *Dunne*, 409 F.2d 341, 342-343 (7th Cir. 1969) (court clerk found immune from suit alleging "malfeasance with respect to filing documents"). See also *Murray* v. *City of Chicago*, 634 F.2d 365, 367 n.4 (7th Cir. 1980), cert. granted, 454 U.S. 962 (1981), cert. dismissed as improvidently granted, May 17, 1982.

[2] Petitioner does not raise his Freedom of Information Act claim before this Court. As the lower courts correctly held, his suit was barred, since the FOIA does not apply to the courts of the United States. See 5 U.S.C. 551(1)(B), 552(e).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1983

FILED
FEB 16 [illegible]
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NO 82-718

ADRON P. BRAINERD,

Petitioner,

vs.

WARREN E. BURGER, et. al,

Respondents.

REPLY BRIEF

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1. Petitioner suggests that respondends and the Court of Appeals majority' misunderstood this courts recent decision in Bankers Trust Co. v. Mallis, 435 U.S. 381, and imposed a new and unjustified limit on relief available under Rule 60 (a) in allowing the District Court to make a "separate judgment" entry.

The Court below in Brainerd v. Beal, 498 F. 2d 901, relied on respondent Cunningham's certification, as apparently this court did, that the docket entries were correct. Based upon these premises, petitioner filed an action against his attorney in Brainerd v. Kates, 68 Ill. App. 3d 781, 386 N.E. 2d 586, and it was at this time (October,7 1977) petitioner found out that Mr. Cunningham had falsely represented the doc- ket entries to the reviewing courts and that petitioner's attorney, Mr. Kates, had timely filed the appeal in Brainerd v. Beal.

This Court in United States v. Indrelunas, 411 U.S. 219, 221, after reviewing the alleged capricious conduct of the government in first seeking to appeal following the filing of the stipulation for damages then later insisting that at that time there had been no judgment which it could have appealed from, this Court held:

> "But whatever may be the appropriate sanctions available in a particular case for capricious conduct on the part of a litigant, we do not believe that a case-by-case tailoring of the "separate document" provision of Rule 58 is one of them".

The Courts below have followed (as indeed they must) this logic, as in Gregson & Assoc. Architects v. Gov. of V.I., 675 F. 2d 589, 592.

2. The cases cited by respondents in relation to Chief Justice Burger are inapropriate in that they pretain to "judicial acts" while the case at bar is addressed to his conduct as a supervisor, where a plaintiff must establish an affirmative link between his injury and the supervisor's failure to act in the face of unconstittutional action by suborinates, such as under the proisions of 28 U.S.C. Section 331. Rizzo v. Goode, 423 U.S. 362.

3. Respondent Cunningham relies on Murray v. City Of Chicago, 634 F. 2d 365, cert, granted, 454 U.S. 962, cert, dismissed, May 17, 1982, as supporting their view that the Federal Court Clerk has "judicial immunity".

A side-by-side comparison of the Court of Appeals' ruling for State and Federal Court Clerks are as follows:

State Court Clerk's Lack of Immunity	Federal Court Clerk's Absolute Immunity
State court clerk Finley's lack of judical immunity: "... pending further clarification of the facts it would be premature to consider whether Finley is entitled to the defense of official immunity (citations) ... Further, if it is shown that Finley's duty to execute warrant recalls is ministerial rather than discretionary, he would not be entitled to immunity (citations)", at page 367.	Federal court clerk Cunninghan's "judical immunity" at appendix page 12: "Malfeasance with respect to filing documents," "comprehend judicial rather ministerial functions." 409 F. 2d at 342. We are bound to follow the logical import of this rule, and believe that the charges against Cunninghan are sufficiently akin to those in Brown so as to fall within the ambit of absolute immunity".

This Court reviewed the question: Does judical immunity cloak circuit court clerk from liability for damages in Section 1983 civil rights suit for acts taken by clerk in discharging his offical duties? This Court in Finley v. Murray, 50 Law Week 3049, case No. 80-2205, ruled that he did not have "judical immunity", cert. dismissed as improvidently granted, May 17, 1982.

CONCLUSION

The petition for a WRIT OF CERTIORARI should be granted.

Respectfully sbmitted.

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520 South Garfield Ave.
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(312) 362-7545

UNITED STATES OF AMERICA)
) SS
NORTHERN DISTRICT OF ILLINOIS)

CERTIFICATE AND AFFIDAVIT

I, H. Stuart Cunningham, Clerk of the United States District Court for the Northern District of Illinois do hereby certify and swear that:

1. The docket in the case Adron P. Brainerd vs. Warren W. Beal, et. al., Civil Action 72 C 1571 contains the following entry:

"1-30-73 Order Defendant's motion to dismiss plaintiff's amended complaint is granted. Order plaintiff's amended complaint is dismissed (Court's memorandum opinion will be filed within short date) - Will, J. (JS6) Mailed notices 2-1-73 gs";

2. In accordance with the docketing procedures in effect in the Office of the Clerk at the time the above docket entry was made the date "1-30-73" represents the date on which the Honorable Hubert L. Will entered the order referred to in the docket;

3. In accordance with the docketing procedures in effect in the Office of the Clerk at the time the above docket entry was made, the date indicated for the mailing of notices, i.e. 2-1-73, is the date on which the order was entered by the Office of the Clerk on the docket;

4. The Notice of Appeal in the above referred to case was filed within thirty days after the date referred to in Paragraph 3 above.

5. Attached hereto is a copy of the Civil Docket involved.

IN TESTIMONY WHEREOF, I have hereto subscribed by name and affixed the seal of the aforesaid Court at Chicago, Illinois this 7th day of October, 1977.

H. STUART CUNNINGHAM

SWORN AND SUBSCRIBED before me this 7th day of October, 1977.

Deputy Clerk